

STATE OF ARIZONA
OFFICE OF ADMINISTRATIVE HEARINGS

_____, a Student, by and through Parent,
Petitioner,

No. 07C-DP-07019-ADE

-v-

Prescott Unified School District,
Respondent.

**ADMINISTRATIVE LAW JUDGE
DECISION**

HEARING: Convened on March 21, 2007, and followed by post-hearing submissions of the Court Reporter's transcript and legal memoranda. The hearing record concluded on April 27, 2007.

APPEARANCES: Attorney Gary L. Lassen represented Petitioner and Parent. Attorney Kellie A. Dolan represented Respondent.

ADMINISTRATIVE LAW JUDGE: Kay A. Abramsohn

This is a final administrative decision in the due process complaint notice ("Due Process Complaint") filed by Petitioner ("Petitioner" or "Student"), by and through his parent, R.P. ("Parent"). Pursuant to Arizona Revised Statutes ("A.R.S.") § 41-1092.01(E) and § 41-1092.02, the Arizona Department of Education referred this matter to the Office of Administrative Hearings ("Tribunal") for final administrative hearing as provided in A.R.S. § 15-766(F).

This matter comes forward under the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 United States Code ("U.S.C.") §§ 1400-1482 (as reauthorized and amended in 2004) and its implementing regulations, 34 Code of Federal Regulations ("C.F.R.") Part 300, as well as the Arizona Special Education statutes, A.R.S. § 15-761 *et seq.*, and its implementing rules, A.A.C. R7-2-401 through R7-2-408 (to the extent not inconsistent with the federal law and rules).

In the Due Process Complaint, Petitioner alleged that Respondent committed multiple procedural violations which denied Petitioner's right to a free appropriate public education ("FAPE") and caused a deprivation of Petitioner's educational rights. In the Due Process Complaint, Petitioner identified the following claims:

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1. In 2004-2005 and 2005-2006, Petitioner's IEP Team did not contain qualified persons and Petitioner's service providers (teachers and aides) were not qualified persons, because that they did not have an appropriate amount of training and continuing education related to autism and methods (based on peer-reviewed research) for teaching autistic children, and Respondent had implied, through actions and posturing, that the persons were qualified.
2. In 2004-2005 and 2005-2006, Respondent failed to assess Petitioner, instead relying on a 2003 evaluation (which Petitioner argued was subjective at best and conclusory at worst).
3. In 2004-2005 and 2005-2006, Respondent cut and pasted the prior year's goals and objectives (and simply increased the expectations) for a new IEP, despite Student failing to make sufficient progress on the prior year's goals.
4. In 2004-2005 and 2005-2006, Respondent pre-selected the cross-categorical program or, alternatively, it was Respondent's unofficial policy or custom to place autistic children in this program regardless of a child's individual needs.
5. In 2004-2005 and 2005-2006, Petitioner's IEP was not geared or aligned toward the state functional standards for children with significant disabilities ages 3 through 21.
6. In 2004-2005 and 2005-2006, Petitioner's IEP contained goals and objectives that were inappropriate, vague, generic, absent strategies for evaluation and incapable on being measured (in order to determine progress), and there are no records of measurement.
7. In 2004-2005 and 2005-2006, Petitioner's IEP noted a need for being taught in a "one to one situation," and the one to one aide was not written into the IEP as a supplementary aide, service or program adaptation.
8. In 2004-2005 and 2005-2006, Respondent failed to maintain an environment that was conducive to learning in Petitioner's placement due to several factors: insufficient number of aides; out-of-control environment

(and excessive noise); high number of other autistic children; and, ratio of staff to children.

9. In 2004-2005 and 2005-2006, Petitioner's minimal advancements cannot be considered to be educational benefits or FAPE, and the grades (or the measurements noted) are neither explained nor the result of data gathered.
10. In 2004-2005, Respondent withheld information that was required to be provided to the Parent, in Respondent knowing about peer reviewed methodologies (such as ABA/DTT), which would appropriately advance Petitioner toward his goals, but choosing not to make it available, not discuss its applicability, and not assuring that Parent was aware of such and other similar methodologies.
11. In 2004-2005 and 2005-2006, Respondent surreptitiously gained Parent's consent to IEPs and services through the withholding of information as to all applicable options for meeting Student's unique needs, in violation of Respondent's fiduciary obligation.
12. In 2005-2006, Respondent refused to provide ABA/DTT services to Petitioner, despite having provided ESY services in summer of 2005 in an ABA/DTT model to Petitioner and despite sending 2 other autistic children to a private ABA/DTT school in Phoenix.
13. By 2006, Petitioner made no objectively determined progress but regressed significantly as shown by several tests.

After consideration of the testimony, documents of record, and legal arguments, the Administrative Law Judge makes the following Findings of Fact, Conclusions of Law and Decision.

FINDINGS OF FACT

1. The Parents of Petitioner filed this Due Process Complaint on November 27, 2006.
2. The Due Process Complaint was, essentially, a re-filing of a due process complaint notice the Administrative Law Judge had previously dismissed for insufficiency (Petitioner's second notice); the parties were concurrently working to

1 resolve a similar, but separate, due process complaint notice (Petitioner's first notice)
2 with regard to Student and his overall educational circumstances. In the filing of the
3 instant Due Process Complaint (Petitioner's third notice), Petitioner had attempted to
4 fully address all of Respondent's objections raised with regard to the second filing.¹

5 Petitioner's Due Process Complaint addressed issues dating back to October of 2003.

6 3. A due process hearing was noticed to be convened on January 17, 2007.

7 4. By operation of law and passage of the time within which any objections
8 to sufficiency would have been filed, Petitioner's Due Process Complaint was deemed
9 to be sufficient regarding the notice requirements of 20 U.S.C. § 1415(f)(7)(A)(ii).

10 5. By e-filed Motion dated December 11, 2006, Respondent moved to
11 dismiss a portion of the Due Process Complaint, arguing that, pursuant to the two-year
12 time frame set forth in 20 U.S.C. § 1415(f)(3)(C), the matter should not be expanded
13 beyond two years under the 20 U.S.C. § 1415(f)(3)(D) exceptions.²

14 6. In the Due Process Complaint, Petitioner alleged that the members of the
15 IEP Teams were not qualified and that the people providing the special education
16 services outlined in the IEPs were not qualified to do so. Petitioner alleged that
17 Respondent's failure to inform Petitioner that the team members and service personnel
18 were not qualified was a withholding of information that was required under law to be
19 provided. Petitioner further alleged that Respondent's failure to provide information, or
20 alternatively withholding information, regarding peer-reviewed methodologies
21 (referencing specifically "ABA/DTT" methodology) was a withholding of information that
22 was required under law to be provided. Petitioner posited that Respondent's above
23 mentioned actions over the period of time from the IEP meeting of October 8, 2003
24 through the September 8, 2006 IEP meeting constituted a "continuing course of
25 conduct" that withheld information that was required under law to be provided.
26 Petitioner cited no language within IDEA 2004, and no rule or case law, for the
27 proposition that such alleged circumstances are, or had ever been, determined to be a

28
29 ¹ This resulted in the lengthy and interrelated claims in the instant Due Process Complaint.

30 ² The two exceptions to the two year time frame are: (1) specific misrepresentations that the school had resolved the problem(s) that form the basis of the complaint(s); or, (2) the school withheld information that was required under Part B of IDEA 2004 to be provided to the parent.

1 withholding of information that is required under Part B of IDEA to be provided to a
2 parent.

3 7. By ORDER dated December 15, 2006, the Administrative Law Judge
4 granted Respondent's Motion to limit the timeframe (to two years) for the underlying
5 Due Process Complaint in accordance with 20 United States Code ("U.S.C.") §
6 1415(f)(3)(D).³ The Administrative Law Judge dismissed the portions of Petitioner's
7 Due Process Complaint dealing with the IEP meetings occurring before November 27,
8 2004, and indicated to the parties that the Tribunal would only consider Petitioner's
9 claims dating from November 27, 2004 regarding allegations of failure to provide FAPE.

10 8. On January 2, 2007, the Tribunal received Petitioner's request for
11 reconsideration arguing that he had not had an opportunity to respond to Respondent's
12 Motion. Petitioner further argued that, according to federal rules, he had not been
13 required to cite any language within IDEA 2004, rule or case law to support his
14 argument.⁴

15 9. On January 5, 2007, the Tribunal received Respondent's response to
16 Petitioner's request for reconsideration.

17 10. At pre-hearing conference, January 8, 2007, Petitioner renewed his
18 request for reconsideration of the time frame, arguing that his ability to show that an
19 exception to the two-year limitation period applied in this matter relied on his being able
20 to present all his evidence and prove his entire case.

21 11. At the time of the pre-hearing conference, the Administrative Law Judge
22 denied Petitioner's request for reconsideration of the determined two-year time frame
23 for the stated reasons in the Tribunal's December 15, 2006 Order.⁵ On query of the
24 parties with regard to the two-year time frame (the split occurring at a point after the

25 ³ The Motion was granted, absent any response from Petitioner due to the urgency of notifying the
26 parties prior to the end of the thirty-day resolution period (so they might have a further opportunity to
27 resolve the matter, in knowing a timeframe for the alleged issues) and with regard to their preparation for
28 the scheduled hearing (so that they might be better able to prepare for the hearing). For the record, in
29 almost every other instance in the other two due process proceedings, Petitioner had fax-filed a response
30 or reply within one day of Respondent's filing, often before the Tribunal had received Respondent's filing.
A response to Respondent's filing would have been due on December 16, 2006.

⁴ On January 4, 2007, the Tribunal received Petitioner's reply (Petitioner's response) to Respondent's
response to Petitioner's request for reconsideration; the Tribunal received Petitioner's reply prior to
receiving Respondent's January 5, 2007 response to Petitioner's motion.

1 2004 meeting at which the 2004-2005 IEP was created), the Administrative Law Judge
2 indicated that the parties would likely need to present background information to enable
3 the Tribunal to understand how the issues came about, and indicated that some
4 evidence would be required to be presented to set the background with regard to the
5 2004-1005 IEP.

6 12. At the pre-hearing conference, the parties advised the Tribunal that a
7 resolution session had been held *prior* to the winter holiday break, but the parties were
8 not specific as to the date of the resolution session. The parties advised that a
9 significant amount of their time since the filing of this Due Process Complaint had been
10 expended in working to resolve a previous filing (Petitioner's first), which had thus been
11 resolved.

12 13. During the telephonic pre-hearing conference, the parties requested a
13 continuance of the matter, for the reason that Petitioner had not yet inspected the
14 educational records to prepare for the hearing and Respondent had not yet had access
15 to all the educational records. Petitioner also indicated that he would want to file a
16 post-hearing brief after receiving the written record of the due process hearing, and the
17 parties agreed that a grant of such requests (a continuance and the consideration of
18 any post-hearing submissions) extended the time frame for issuance of a decision in
19 this matter.

20 14. By ORDER dated January 19, 2007, the matter was reset for due process
21 hearing, to be convened on March 21, 2007.

22 15. The parties complied with disclosure as mandated and as ordered by the
23 Administrative Law Judge. Petitioner's counsel filed his appearance and filed
24 disclosure as mandated and as ordered by the Administrative Law Judge.

25 16. At the time of hearing, the parties stipulated to the admission of the
26 exhibits: for Petitioner, Exhibits 1 - 15; and for, Respondent, Exhibits A - X. Some
27 Exhibits are duplicates. At the time of the hearing, the parties agreed that submission
28 and consideration of post-hearing memoranda extended the time frame for issuance of
29 a decision in this matter.

30 ⁵ The Administrative Law Judge reiterated the denial in ORDER dated January 19, 2007.

17. The parties filed post-hearing legal memoranda, which are considered to be a portion of the hearing record.

18. At the time of the filing of the Due Process Complaint, Student was 1 years old. By way of background, this child was a typical child until the age of 19 months or 20 months, at which time, 2 began to regress and became nonverbal (and demonstrated other developmental delays). See Exhibit L for a recitation of Student's early childhood history. Student has a diagnosis of autism, and has medical conditions of asthma and allergies; the diagnosis dates for these conditions are not known.

19. Student and his family moved to Prescott in 3, Student had previously been enrolled in a pre-school for children with special needs in another state. Following an evaluation, Student was determined to be eligible for special education services. At an October 2003 IEP meeting, the IEP Team created an IEP for 2003-2004 year. The 2003-2004 IEP is not a part of the record; however, the Progress Report is, and contains the goals and objectives from the IEP. See Exhibit 15.

20. On October 6, 2004, the IEP Team created an IEP for 2004-2005 year. See Exhibit B. The IEP contained 12 overall goals, some with multiple portions.

21. The IEP utilized a combination of defined "values" and numbers to indicate progress toward the goals. The various "values" were as follows: mastered, learned the skill; exceeds expected progress; meets expected progress; approaches expected progress; and, below expected progress. The numeric designations were as follows: (1) the number 1 indicating sufficient progress to achieve the goal within a one year period; and, (2) the number 2 to indicate insufficient progress to achieve the goal within a one year period. For example, if Student began the year at a level of "approaching expected progress" and became more skilled at that goal, Student was given a value of "meets expected progress" or "exceeds expected progress" along with a numeric indication of sufficient or insufficient progress to achieve the goal within the one year IEP period.

22. According to the 2004-2005 Progress Report, Student's progress varied over the year.⁶ See Exhibit 15 (also Exhibit G). Student progressed but then fell below

⁶ The Administrative Law Judge utilizes the term "progressed" herein to indicate either an improvement in the "value" and/or an improvement in the "numeric."

1 the expectation to achieve the goal for two goals: **PSO-2**, Cooperative play; and **PCV-1**,
2 Comprehension. Student progressed and met expectations, but made insufficient
3 progress to achieve the goal for three goals: **5WP-FS2**, Develop work habits; **PSO-3**,
4 Social skills; and **SL3-12**, Effective communication. Student met expectations but
5 made insufficient progress to achieve the goal for one goal: **SL-9**, Social greetings.
6 Student progressed, and made sufficient progress to achieve the goal for three goals:
7 **PSH-2**, Self-help; **OT** [Occupational therapy skills], Improved fine motor skills; and **PO3-**
8 **1a**, Self-control and responsibility. Student progressed, exceeding expectations but
9 made insufficient progress to achieve the goal for two goals: **SL-1**, Improve
10 communication; and **SL3-1**, Use of language. Student progressed, and exceeded the
11 expectations to make sufficient progress to achieve the goal for one goal: **SL3-8**,
12 Improve speaking and listening.

13 23. In 2005, Parent enrolled Student in an Applied Behavioral Analysis
14 ("ABA") Program at A.S.S.I.S.T. in Prescott, Arizona for a summer program.

15 24. At a May 5, 2005 meeting, the parties discussed Student's current status,
16 problems and progress; this was not the IEP meeting at which Student's 2005-2006 IEP
17 was created. See Exhibit A, an unofficial transcript of the meeting.⁷ Essentially,
18 Parent wanted to assure Student's continued progress in speech and language and to
19 discuss ESY. Parent queried whether any of the staff had ABA or IBI [Intensive
20 Behavior Intervention] training, and was advised that they did not, but that Respondent
21 could work with them to get them up to speed. When Parent indicated that he had
22 already enrolled Student for the A.S.S.I.S.T. program, Respondent indicated to Parent
23 that Respondent would pay for it and that it would be Student's ESY placement for the
24 summer.

25 25. Parent later expressed his dissatisfaction with the A.S.S.I.S.T. program
26 and/or the results of the placement to one of the special education staff aides (who had
27

28 ⁷ The transcript was made from a tape of the IEP meeting. However, the transcript contains many
29 places where the transcriber cannot determine what was being said, and the transcript indicates that there
30 were many times when several people were talking at the same time and the transcriber could not make
out what was being said. This was the only transcript presented to the administrative record from an IEP
meeting or a Team meeting.

1 also been working at the A.S.S.I.S.T. program in the summer of 2005).⁸ The aide
2 shared this information with regard to development of the 2005-2006 IEP.

3 26. On October 26, 2005, the IEP Team created an IEP for 2005-2006 year.
4 See Exhibit 15 (also Exhibit F). The goal and objectives in this IEP were significantly
5 pared down from the prior IEP, with four goals (each with multiple portions). The IEP
6 contained the following goals: OT, Fine motor skills; [Undesignated], Participation and
7 independence; SL3-12, Effective communication; and SL3-7, Speech motor patterns.

8 27. According to the Progress Report, Student met expectations to make
9 sufficient progress to achieve the goals set forth in the IEP.

10 28. In November 2006, on request of Parent, the tests that had been
11 administered to Student in October 2003 were again given to Student. See Due
12 Process Complaint for a comparison of some tests, and Exhibit X.⁹ Parent argues that
13 a comparison of the scores shows that Student regressed during the three years. The
14 Due Process Complaint shows that only the Vineland Adaptive Behavior Scales
15 ("Vineland ABS") test was given in both assessments, with the scores on the 2003 tests
16 higher than the scores on the 2006 tests.

17 29. School Psychologist Sonia Di Christina testified with regard to the testing
18 administered in late October 2006 and in November 2006. Ms Di Christina testified that
19 the Vineland ABS is designed to measure various things that are expected of a child at
20 that age in comparison to other children that age and indicated, in summary, that
21 Student has significant limitations. Ms. Di Christina indicated the difference in the
22 scores (i.e., the lower scores in 2006) was a natural result of Student at 7 years of age
23 not being able to do things that a typical child of that age is able to do, and that Student
24 was not expected to be able to do as much when he was younger (i.e., when tested in
25 2003) that as a child, and he, is expected to be able to do at age 7.

26 30. At hearing, Petitioner testified that the case was not a case about ABA
27 methodology but was a case about providing FAPE. Petitioner went on to clarify,

28 ⁸ At hearing, Parent clarified that his dissatisfaction with the A.S.S.I.S.T. program did not mean that he
29 was unhappy with "ABA, or ABA methodologies, or discreet trial teaching methodologies."

30 ⁹ There are two tests which apparently were not given both in 2003 and in 2006: the Stanford Binet IQ
test; and, the KABC-II IQ test. Therefore, the comparative test results consist of the various portions of the
Vineland Adaptive Behavior Scales (Classroom and Survey Editions).

1 however, that if ABA was a portion of what was required to provide Student with an
2 opportunity for education, then the case was "in some manner" about ABA.

3 31. At hearing, Petitioner argued that Respondent was not in compliance with
4 the IDEA (particularly as amended in 1997) and with No Child Left Behind Act.
5 Petitioner argued that the individuals providing services were not highly qualified as
6 required under the Acts, and that the programs and services provided did not comport
7 with requirements of the Acts. Petitioner's position is that a school is required to
8 provide a program that is based on scientifically based methodology and on peer-
9 reviewed instructional methodology.

10 32. In post-hearing memorandum, Petitioner argued that "some educational
11 benefit," as set forth in the case of *Hendrick Hudson District Board of Education v.*
12 *Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982) was no longer the applicable standard,
13 and that the principles therein have been superseded because *Rowley* was decided
14 prior to the IDEA requiring (1) that students be transitioned to post-secondary
15 education, independent living or self-sufficiency and (2) that schools review the IEPs to
16 determine whether annual goals were being attained. Petitioner argued the law has
17 been amended several times. Petitioner argued that "meaningful benefit" was now
18 required in relation to the potential of the child, and that the intent of the IDEA was to
19 insure a "quality of opportunity, full participation, independent living and economic self-
20 sufficiency for individuals with disabilities."¹⁰ Petitioner relies on *Deal v Hamilton County*
21 *Board of Education*, 392 F.3d 840 (6th Circuit 2004) for the argued standard of
22 "meaningful educational benefit." Petitioner posited that the IDEA, as amended in 1997
23 and 2005, requires that an instructional methodology be based on peer-reviewed
24 research, and (1) no such methodology was in place that complied with the IDEA during
25 these two years and (2) there was no methodology in place that met the unique and
26 special needs of Student.

27 33. Respondent argued that the educational standard remains as stated in
28 *Rowley*, where the court determined that a school provides FAPE "by providing
29 personalized instruction with sufficient support services to permit the child to benefit

30 ¹⁰ With regard to this argument, Petitioner references 20 USC § 1400(c)(1), a portion of the
congressional findings for the IDEA, as amended in 2004.

1 from that instruction." *Rowley* at 188. Respondent argued that IDEA may have
2 undergone changes, but that Congress did not change the definition of FAPE at 20
3 U.S.C. § 1401(18), and that Courts have, consistently (and recently), rejected
4 arguments that the changes in IDEA and the No Child Left Behind Act have changed
5 the *Rowley* standard.¹¹

6 34. The court reporter's transcript is considered to be a portion of the hearing
7 record in this matter. However, the Tribunal's audio record is the official recording of
8 the due process hearing in this matter.

9 CONCLUSIONS OF LAW

10 1. Petitioner's claims with regard to IEP Team members or service providers
11 not being "qualified" are not within the purview of any due process complaint notice
12 under the IDEA. Nothing in the IDEA creates a right of action on behalf of a student for
13 the failure of a school to employ highly qualified special education staff (teachers or
14 aides). See 34 C.F.R. § 300.18(f) and § 300.156(e).¹² Additionally, it is the state
15 education agency's responsibility to establish the standards for personnel qualifications.
16 See 34 C.F.R. § 300.156(a). Pursuant to A.A.C. R7-2-610, the Arizona standards
17 mandate cross-categorization certification for special education teacher and service
18 providers, and do not provide specific certifications regarding instruction to autistic
19 students.

20 2. Petitioner's claims fail with regard to the use of the October 2003
21 assessment in preparing or revising Student's IEP for the 2004-2005 and 2005 -2006
22 school years. A school district is required to re-evaluate a student at least every three
23 years, but may re-evaluate once a year (or more often, on agreement of the school
24 district and the parent). See 34 C.F.R. § 300.303(b) and 20 U.S.C. § 1414(a)(2). In
25 this case, the evidence does not demonstrate either that a re-evaluation was requested
26 or that a re-evaluation was refused by either party at any time. Petitioner has not
27

28 ¹¹ See Respondent's post-hearing memorandum, page 14, for citations of cases decided in the 1st (2001
29 and 2004), 4th (2004), 7th (2004), and 8th (2004) Circuits cases.

30 ¹² However, nothing in the IDEA prevents a person from filing an investigative complaint with the state
education agency about staff qualifications. See 34 C.F.R. § 300.18(f) and § 300.156(e). See also 20
U.S.C. § 1412(a)(14).

1 shown that the use of the October 2003 assessment for preparation of the IEPs for the
2 2004-2005 and 2005 -2006 is a procedural violation by Respondent.

3 3. Petitioner's claims fail with regard to the use of prior year's goals and
4 objectives as a baseline (here, the cut and paste argument) for a new IEP being a
5 violation of the IDEA. The record demonstrates that, effectively, the Team created a
6 new IEP for the 2004-2005 year.¹³ In this regard, the IDEA states that the IEP is to
7 include statements of the special education services to be provided to the student and
8 the modifications or supports that will be provided "for the child...to advance
9 appropriately toward attaining the annual goals." See 20 U.S.C. § 1414(d)(1)(A)(iv)(aa).
10 The hearing record demonstrates that the Team discussed Student's existing
11 capabilities and/or functioning levels, and any improvements thereto, as a part of the
12 IEP process. A Review of Student's education records, including the Progress Reports,
13 demonstrated Student's levels of achievement of the years' stated goals and objectives.
14 In this case, however, the evidence demonstrated that the IEP Team, which included
15 the parent(s), determined new IEPs at the time of the IEP meetings. See 34 C.F.R. §
16 300.320 through 324. Absent an objection at the time of the meeting (or in a due
17 process complaint notice of disagreement as to that newly proposed IEP), the
18 Administrative Law Judge must conclude that Petitioner agreed with the IEPs when
19 created and gave consent for the services to be provided. Petitioner has not shown
20 that the use of the same or similar goals (with an increase in mastery levels) was a
21 procedural violation by Respondent.

22 4. Relatedly, Petitioner claims that Student was deprived of education and
23 denied FAPE when the same goals and objectives were utilized for 2004-2005, despite
24 Student not making "sufficient" progress on his IEP goals from the previous IEP.¹⁴
25 Also related is Petitioner's claim that Student was deprived of education and denied
26 FAPE as demonstrated by "minimal advancements" in 2004-2005 and 2005-2006 under

27 ¹³ The IEP created for the 2005-2006 year differed from the prior IEPs and was pared down with regard
28 to Student's goals and objectives. See Parent testimony.

29 ¹⁴ The IEP from 2003-2004, and any allegations regarding FAPE for 2003-2004, are not at issue in this
30 matter due to the time period limitation (as ordered by the Administrative Law Judge). However, a copy of
2003-2004 progress report is contained in the hearing record (see Exhibit 15), and in the context of this
argument, the Administrative Law Judge notes that both parties presented general testimony with regard
to Student's progress.

1 the grades and noted measurements for the stated goals and objectives. Also
2 somewhat related is Petitioner's claim that Petitioner made no objectively determined
3 progress but regressed significantly as shown by several tests. Petitioner failed to
4 present any testimonial evidence regarding the specific goals and objectives contained
5 in the 2004-2005 IEP at issue. Petitioner failed to present substantive evidence of
6 "insufficient" progress. Student's education records include Progress Reports, which
7 demonstrated Student's level of achievement with regard to the years' stated goals and
8 objectives, and demonstrated some progress toward stated goals and objectives. The
9 Administrative Law Judge notes that these claims, essentially, point to Petitioner's legal
10 arguments, whether "minimal advancements or progress" are considered to be an
11 educational benefit or a provision of FAPE under the IDEA. The Administrative Law
12 Judge will discuss these claims in that context hereafter.

13 5. Petitioner's claim fails that the November 2006 tests with lower testing
14 scores demonstrate a failure of Respondent to provide an education. Petitioner's
15 argument is based on the differences between test results from tests performed in
16 October 2003 and tests performed in October and November 2006. Based on the Due
17 Process Complaint, the only test in common in the two years was the Vineland ABS. At
18 hearing, Ms. Di Christina testified that the differences in the 2003 and 2006 scores were
19 to be expected, given that the Vineland ABS is geared to show adaptive behaviors of a
20 child in comparison to other children his age and Cody has significant limitations (in
21 comparison to a typical child at age 8). See Finding of Fact No. 29, herein. Based on
22 the hearing record, Petitioner has not shown that the testing scores show regression
23 due to any failure of an IEP.

24 6. Petitioner's claim fails that a failure to discuss ABA/DTT methodology
25 (here, the claim of withholding information regarding ABA methodology) was a violation
26 of the IDEA or the federal rules. The IDEA sets forth that an IEP is to include
27 statements of the special education services, based on peer-reviewed research *to the*
28 *extent practicable*, to be provided to the student. See 20 U.S.C. § 1414(d)(1)(A)(iv).
29 The implementing federal rule simply indicates that positive behavioral interventions,
30 supports and other strategies are to be *considered* by the IEP Team if the child has
behaviors that impede the child in learning or that impeded other children's learning.

1 See 34 C.F.R. § 300.324(a)(2)(i). Nothing in the IDEA or the federal rules mandates
2 that an IEP created by an IEP Team contain specific instructional methodologies or
3 strategies or any particular techniques. Further, nothing in the federal rules expands on
4 the concept of services being based on "peer-reviewed research to the extent
5 practicable." Petitioner has not shown that a failure to discuss ABA/DTT methodology
6 was a procedural violation by Respondent.

7 7. As a related claim, Petitioner claimed that Respondent surreptitiously
8 gained Parent's consent to IEPs and services through the withholding of information of
9 all applicable options for meeting Student's unique needs. Petitioner claimed this to be
10 a violation of Respondent's "fiduciary" obligations. Petitioner did not pursue this claim
11 at hearing, and cited no law, rule or case law in this regard. The Administrative Law
12 Judge is unaware of any mention of a local education agency's "fiduciary" responsibility
13 within the purview of any due process complaint notice under the IDEA. As discussed
14 above, the IEP Team is required to consider behavioral interventions, supports and
15 other strategies if a child has behaviors that impede the child in learning; however,
16 nothing in the IDEA or the federal rules mandates the IEP Team memorialize specific
17 instructional methodologies or strategies or any particular techniques in the IEP. The
18 hearing record demonstrated that the IEP Team, including the parent(s), came to
19 agreement with regard to the IEPs created for 2004-2005 and 2005-2006. While the
20 federal law likely imposes certain specific parameters and requirements with regard to
21 the funding and reporting of expenditures, the issues resolvable through due process
22 complaints do not include funding issues. Petitioner failed to present any evidence of
23 any "fiduciary" obligation of Respondent with regard to discussions of options for
24 meeting a child's special education needs. Therefore, Petitioner failed to sustain his
25 burden on this claim.

26 8. A related argument is Petitioner's claim that Respondent had pre-selected
27 its placement and the services to be provided for Student, regardless of the Student's
28 individual needs, in violation of the IDEA. Petitioner's claim fails. As discussed above,
29 the hearing evidence and the educational record demonstrate otherwise. Student's
30 IEPs were created following discussion of Student's functioning and goals and
objectives. The evidence demonstrated that the IEP Team, which included the

parent(s), determined new IEPs at the time of the IEP meetings. The Administrative Law Judge cannot conclude that the special services to be provided to Student for these academic years were pre-selected.

9. Another related argument is Petitioner's claim that Respondent refused to provide ABA/DTT services to Student.¹⁵ Again, the hearing evidence showed otherwise. The hearing record demonstrated that Parent had arranged for Student to attend/participate in an ABA program at A.S.S.I.S.T. in Prescott, Arizona for ESY placement in the summer of 2005, and Respondent paid for that program. See Exhibit A and Q. The hearing evidence showed that Student reacted negatively and had constant behavior problems in the A.S.S.I.S.T. program. See Fornara testimony. The hearing evidence showed that Parent discussed his dissatisfaction with the summer program with Respondent's staff, and that this information was shared with regard to development of the 2005-2006 IEP. Therefore, the record shows that ABA was "considered" as a methodology but was not adopted as a methodology or specified as such in the 2005 -2006 IEP.¹⁶

10. Petitioner's claim fails that the IEPs were not geared or aligned toward the state's functional standards for children with significant disabilities ages 3 through 21. Petitioner failed to present to the Tribunal the state's functional standards.¹⁷ Petitioner failed to present any evidence that Student's IEPs were neither geared toward nor aligned with the state's functional standards for children with significant disabilities. Therefore, Petitioner failed to sustain his burden on this claim.

¹⁵ In this regard, Petitioner's also argued that Respondent provided ABA services for two other autistic children while refusing ABA services to Student. See Exhibit 10, which contains three invoices: one for Student for summer 2005 ESY placement at A.S.S.I.S.T.; a second one for an unnamed student for summer 2005 ESY placement at A.S.S.I.S.T.; and, a third one for an unnamed student for fall semester of 2005-2006 (invoiced to Play ABA). The Administrative Law Judge notes that one witness, Ms. Levin, indicated that her child was at Chrysalis Academy, (a private school owned by the same directors who own Play ABA); when queried directly, Ms. Levin indicated it was a private placement.

¹⁶ The Administrative Law Judge notes that, in February 2007, Respondent provided training for its staff in ABA techniques, and ABA methods (as utilized by the current teacher and aide) have been successful in effecting positive changes in Student's behaviors and appropriate responsiveness in school.

¹⁷ Respondent provided the state's standards in its post-hearing submission. The Administrative Law Judge, therefore, considers the submission and its attachment to be a part of the hearing record. However, Petitioner failed to pursue evidence or argument with regard to comparing the IEPs at issue with the state's standards.

1 11. Petitioner's claim fails that the IEPs' goals and objectives were
2 inappropriate, vague, generic, absent strategies for evaluation and incapable on being
3 measured (in order to determine progress), and there are no records of measurement.
4 Although the IEPs were in the record, Petitioner failed to present any testimonial
5 evidence regarding either those specific goals and objectives that were contained in
6 either IEP at issue or any more appropriate goals and objectives. Although some
7 information was brought forth through testimony and in the educational records,
8 Petitioner presented little information regarding Student's capabilities and skills.
9 Petitioner failed to present any evidence with regard to measurements of progress
10 towards the goals and objectives in the IEPs and the alleged insufficiency of the
11 measurements. Therefore, Petitioner failed to sustain his burden on this claim.

12 12. Petitioner's claim fails that Petitioner's IEP noted a need for being taught
13 in a "one to one situation." The hearing record demonstrated the Team believed that
14 Student needed both "one to one" instruction and small group instruction. The IEP
15 states, under Present Levels of Educational Performance, **Other needs**, "... [Student]
16 needs to be taught in a one to one situation and in small groups..." See Exhibit B, page
17 5 of 13. Therefore, Petitioner failed to sustain his burden on this claim.

18 13. Petitioner's claim fails that Respondent failed to maintain an environment
19 that was conducive to learning in Petitioner's placement. The hearing record failed to
20 demonstrate the allegations made in the Due Process Complaint and failed to
21 demonstrate that those allegations are, under the IDEA, either a procedural or
22 substantive violation. Therefore, Petitioner failed to sustain his burden on this claim.

23 14. Petitioner's claim fails that *Rowley* is no longer a standard. *Rowley*
24 remains the base standard in the 9th Circuit. Petitioner's reliance on *Deal* is misplaced.
25 In *Deal*, a 6th Circuit decision, the 6th Circuit was distinguishing a previous 6th Circuit
26 determination in which it had held that a school was only required to provide
27 educational programming that is reasonably calculated to enable the child to derive
28 more than *de minimus* educational benefit. *Deal* at 861, citing *Doe ex rel. Doe v Smith*,
29 879, F.2d 1340, 1341 (6th Cir., 1989). The Court agreed that, pursuant to *Rowley*, the
30 school was not required to "maximize" each child's potential, but determined to adopt
the 3rd Circuit position that an IEP must confer a "meaningful educational benefit." *Deal*

1 at 862, citing *T.R. ex rel. N.R. v Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577
2 (3d Cir. 2000) (internal citations omitted). The Court further determined that nothing in
3 *Rowley* precluded a setting of a higher standard. *Deal* at 863. The Court concluded
4 that the intent of Congress "appeared" to require provision of a "meaningful educational
5 benefit towards the goal of self-sufficiency, especially where self sufficiency is a realistic
6 goal for a particular child." *Deal* at 864. The Court then remanded the matter to the
7 District Court for a determination. The Administrative Law Judge concludes that these
8 findings are not an overruling of *Rowley*.

9 In 1996, in *County of San Diego v. California Special Education Hearing Officer*,
10 24 IDELR 756 (United States Court of Appeals, 9th Cir (1996)), the 9th Circuit
11 determined that the standard is not merely whether the placement was "reasonably
12 calculated to provide the child with educational benefits," but whether the child makes
13 progress toward the goals set forth in the IEP. The Court reiterated the *Rowley*
14 standard, with regard to assuring that an IEP is specially designed to meet the unique
15 needs of the child, supported by such services as necessary to allow the child "to
16 benefit" from the instruction [citing *Rowley* at 189]. In the instant case, the
17 Administrative Law Judge concludes that Student's IEPs were created and designed to
18 provide educational benefit, given Student's apparent abilities; the record demonstrated
19 that Student has significant limitations. When IEPs are designed to allow progress on
20 the goals and objectives and the student makes limited progress, that is sufficient with
21 regard to a valid IEP.¹⁸

22 15. The burden of proof in a due process hearing is placed on the party
23 seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this matter,
24 Petitioner bears the burden to demonstrate his claims, as alleged, resulted in a denial
25 of FAPE. Based on the foregoing, Petitioner had not met his burden and the Due
26 Process Complaint should be dismissed.

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29 ¹⁸ See also 34 C.F.R. § 300.39(b)(3), the definition of specially designed instruction. The primary
30 component of "specially designed instruction" is the adaptation of content, methodology or delivery of
instruction, "as appropriate", to address the unique needs of the child that result from the child's disability.

1 Corrected copy retransmitted by mail this 21 day of May, 2007, to:

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By Chris Fishel

1 LIST OF CORRECTIONS TO DECISION 07C-DP-07019-ADE

- 2 1. Page 7, line 21: the word "indicated" corrected to "indicate".
3 2. Page 11, line 1: removal of comma after the word "argued".
4 3. Page 11, line 7: insertion of "the" after "record is".
5 4. Page 11, Footnote 11, line 1: insertion of comma after "page 14".
6 5. Page 17, line 19: the word "make" corrected to "makes".
7 6. Page 17, line 22: removal of comma after 546 in case citation.
8 7. Attorney for Petitioner added to mailing list.

9 CHANGES made this day, May 21, 2007

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11 Kay A. Abramsohn
12 Administrative Law Judge
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